

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT BARABINO,
Plaintiff,
v.

2:04-cv-2359-MCE-PAN

MEMORANDUM AND ORDER

DAN GAMEL, INC., FLEETWOOD
ENTERPRISES, INC., and
FLEETWOOD MOTOR HOMES OF
PENNSYLVANIA, INC.
Defendants.

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Through the present action, Plaintiff Robert Barabino ("Plaintiff") alleges that Dan Gamel, Inc. ("Gamel"), Fleetwood Enterprises, Inc., and Fleetwood Motor Homes of Pennsylvania, Inc. (collectively "Defendants") breached various state and federal consumer protection laws during the course of selling him a Fleetwood recreational vehicle.¹

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¹Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

1 Plaintiff specifically alleges that all Defendants violated
2 the California Song-Beverly Consumer Warranty Act ("Song-Beverly
3 Act"), Cal. Civ. Code §§ 1790 et seq.; the Magnuson-Moss Warranty
4 Act ("MMWA"), 15 U.S.C. §§ 2301 et seq.; the Consumer Legal
5 Remedies Act ("CLRA"), Cal. Civ. Code §§ et seq.; and
6 California's Unfair Competition Law, Cal. Bus. and Prof. Code §§
7 17200 et seq. ("Five Claims"). Plaintiff further alleges against
8 Gamel only, claims of fraud in inducement, negligent
9 misrepresentation, and violations of Automobile Sales and Finance
10 Act, Cal. Civ. Code §§ 2981 et seq., the Federal Odometer Law,
11 and the Fair Debt Collection Practices Act, Cal. Civil Code §
12 1788.17. Fleetwood Enterprises, Inc. and Fleetwood Motor Homes
13 of Pennsylvania, Inc. (collectively, "Fleetwood") have moved for
14 summary judgment or, in the alternative, summary adjudication of
15 the Five Claims against them. For the reasons set forth below,
16 Fleetwood's Motion is granted in part and denied in part.

17 18 **BACKGROUND**

19
20 During November and December of 2001, Plaintiff negotiated
21 with Gamel for the purchase of a new 2001 Fleetwood Bounder 39Z
22 ("Bounder"). On December 22, 2001, Plaintiff entered into an
23 agreement with Gamel to purchase the Bounder. Pl.'s Compl. at ¶¶
24 11, 14. Although the Bounder was purchased in December of 2001,
25 it was not delivered to Plaintiff until April 28, 2002. Gamel
26 informed Plaintiff that delivery was delayed because the Bounder
27 had various mechanical problems which needed to be repaired by
28 the dealer prior to delivery. Pl.'s Compl. at ¶ 25.

1 Rather than taking delivery of the Bounder at the Gamel
2 dealership in California, Plaintiff elected to take delivery in
3 Reno, Nevada. Plaintiff's sole purpose for taking delivery of
4 the Bounder outside of California was to avoid California sales
5 tax. After delivery, problems developed with the Bounder which
6 required it to be taken in for repairs approximately eleven times
7 between April of 2002 and November of 2004. Plaintiff now seeks
8 compensation pursuant to both state and federal consumer
9 protection statutes.

10
11 **STANDARD**
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13 The Federal Rules of Civil Procedure provide for summary
14 judgment when "the pleadings, depositions, answers to
15 interrogatories, and admissions on file, together with
16 affidavits, if any, show that there is no genuine issue as to any
17 material fact and that the moving party is entitled to a judgment
18 as a matter of law." Fed. R. Civ. P. 56(c). One of the
19 principal purposes of Rule 56 is to dispose of factually
20 unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477
21 U.S. 317, 325 (1986).

22 Rule 56 also allows a court to grant summary adjudication on
23 part of a claim or defense. See Fed. R. Civ. P. 56(a) ("A party
24 seeking to recover upon a claim ... may ... move ... for a
25 summary judgment in the party's favor upon all or any part
26 thereof."); see also *Allstate Ins. Co. v. Madan*, 889 F. Supp.
27 374, 378-79 (C.D. Cal. 1995); *France Stone Co., Inc. v. Charter*
28 *Township of Monroe*, 790 F. Supp. 707, 710 (E.D. Mich. 1992).

1 The standard that applies to a motion for summary
2 adjudication is the same as that which applies to a motion for
3 summary judgment. See Fed. R. Civ. P. 56(a), 56(c); *Mora v.*
4 *ChemTronics*, 16 F. Supp. 2d. 1192, 1200 (S.D. Cal. 1998).

5 Under summary judgment practice, the moving party
6 always bears the initial responsibility of informing
7 the district court of the basis for its motion, and
8 identifying those portions of 'the pleadings,
9 depositions, answers to interrogatories, and admissions
on file together with the affidavits, if any,' which it
believes demonstrate the absence of a genuine issue of
material fact.

10 *Celotex Corp. v. Catrett*, 477 U.S. at 323(quoted Rule 56(c)).

11 If the moving party meets its initial responsibility, the
12 burden then shifts to the opposing party to establish that a
13 genuine issue as to any material fact actually does exist.

14 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
15 585-87 (1986); *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S.
16 253, 288-89 (1968).

17 In attempting to establish the existence of this factual
18 dispute, the opposing party must tender evidence of specific
19 facts in the form of affidavits, and/or admissible discovery
20 material, in support of its contention that the dispute exists.
21 Fed. R. Civ. P. 56(e). The opposing party must demonstrate that
22 the fact in contention is material, i.e., a fact that might
23 affect the outcome of the suit under the governing law, and that
24 the dispute is genuine, i.e., the evidence is such that a
25 reasonable jury could return a verdict for the nonmoving party.
26 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251-52
27 (1986); *Owens v. Local No. 169, Assoc. of Western Pulp and Paper*
28 *Workers*, 971 F.2d 347, 355 (9th Cir. 1987).

1 Stated another way, "before the evidence is left to the jury,
2 there is a preliminary question for the judge, not whether there
3 is literally no evidence, but whether there is any upon which a
4 jury could properly proceed to find a verdict for the party
5 producing it, upon whom the onus of proof is imposed." *Anderson*,
6 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442,
7 448, 20 L.Ed. 867 (1872)). As the Supreme Court explained,
8 "[w]hen the moving party has carried its burden under Rule 56(c),
9 its opponent must do more than simply show that there is some
10 metaphysical doubt as to the material facts Where the record
11 taken as a whole could not lead a rational trier of fact to find
12 for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586-87.

14 In resolving a summary judgment motion, the evidence of the
15 opposing party is to be believed, and all reasonable inferences
16 that may be drawn from the facts placed before the court must be
17 drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255.
18 Nevertheless, inferences are not drawn out of the air, and it is
19 the opposing party's obligation to produce a factual predicate
20 from which the inference may be drawn. *Richards v. Nielsen*
21 *Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
22 *aff'd*, 810 F.2d 898 (9th Cir. 1987).

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ANALYSIS

1. Express Warranty; Song-Beverly Act

Fleetwood first contends that because Plaintiff took delivery of the Bounder out of state, California's Song-Beverly Act is inapplicable. California law is clear that where title passes outside of California, the Song-Beverly Act does not apply. *Cummins, Inc. v. Superior Ct.*, 36 Cal. 4th 478 (2005). In addition, a recent California appellate court held that, under California law, title to a motor home passes upon and at the place of delivery. *Davis v. Newmar Corp.*, 136 Cal. App. 4th 275 (Cal. Ct. App. 2006).

In response, Plaintiff argues that the Court should reject the *Davis* holding. Specifically, Plaintiff avers that California law applies to the case at bar based on the Restatement (Second) of Conflict of Laws § 191 and that the *Davis* holding is erroneous. The Court disagrees.

In order for Plaintiff to enjoy the protections of the Song-Beverly Act, the sale must have consummated in California. See *Id.* at 493. A sale is deemed completed and consummated when the purchaser of a vehicle has paid the purchase price, or, in lieu thereof, has signed a purchase contract or security agreement, *and has taken physical possession or delivery of the vehicle.* Cal. Veh. Code § 5901(d) (emphasis added). While Plaintiff may have negotiated the sale and even paid part of the purchase price in California, the sale was not consummated until he took "physical possession or delivery of the vehicle" in Nevada. *Id.*

1 The foregoing dispositively resolves the issue. However, in an
2 abundance of caution, the Court further notes that the California
3 Uniform Commercial Code supports the Court's finding that title
4 passed to Plaintiff in Nevada. Specifically, the Code provides
5 that:

6 "[u]nless otherwise explicitly agreed title passes to
7 the buyer at the time and place at which the seller
8 completes his performance with reference to the
9 physical delivery of the goods, despite any reservation
of a security interest and even though a document of
title is to be delivered at a different time or place."

10 Cal. U. Com. Code § 2401 (2006).

11 Given that the sale consummated in Nevada and that the Song-
12 Beverly Act does not apply to sales made outside the state of
13 California, Fleetwood's Motion for Summary Adjudication of
14 Plaintiff's first and second causes of action based on the Song-
15 Beverly Act is granted.

16
17 **2. Magnuson-Moss Warranty Act - Express Warranty**
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19 The MMWA permits "a consumer who is damaged by the failure
20 of a supplier [or] warrantor ... to comply with any obligation
21 under this chapter [15 U.S.C. §§ 2301 et seq.], or under a
22 written warranty [or] implied warranty" to sue in United States
23 district court. 15 U.S.C. § 2310(d). In order for a warrantor
24 warranting a consumer product by means of a written warranty to
25 meet the federal minimum standards for warranty, such warrantor
26 must remedy such consumer product within a reasonable time and
27 without charge, in the case of a defect, malfunction, or failure
28 to conform with such written warranty. *Id.* at 2304(a)(1).

1 The warrantor must remedy the defects or malfunctions within a
2 reasonable number of attempts by the warrantor. *Id.* at
3 2304(a)(4). In the event the warrantor fails to remedy the
4 identified issue within a reasonable number of attempts, the
5 warrantor must permit the consumer to elect either a refund for,
6 or replacement without charge of, such product or part. *Id.*

7 Fleetwood seeks summary adjudication of this claim on the
8 ground that Plaintiff has failed to establish that any non-
9 conformities existed in the box portion of the Bounder.

10 Plaintiff rebuts that there are myriad issues of material fact
11 regarding whether Fleetwood remedied identified issues within a
12 reasonable time or within a reasonable number of attempts. More
13 precisely, Plaintiff argues that during the first 467 days of
14 ownership, the Bounder was out of service for a total of 214 days
15 representing a significant breach of warranty.

16 The Court finds that issues of material fact exist with
17 respect to whether Fleetwood remedied the defects that Plaintiff
18 identified as required by the MMWA. The Court is not persuaded
19 that the Bounder was entirely conforming as Fleetwood contends.
20 Instead, the Court finds that Plaintiff has satisfied his burden
21 of showing issues of material fact sufficient to preclude summary
22 adjudication of this claim. Consequently, Fleetwood's Motion for
23 Summary Adjudication of Plaintiff's third claim is denied.

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1 **3. Magnuson-Moss Warranty Act - Implied Warranty**

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3 Fleetwood seeks summary adjudication of Plaintiff's fourth
4 cause of action for breach of the implied warranty of
5 merchantability brought under the MMWA. Fleetwood contends that
6 this claim fails because there is no viable state law claim upon
7 which the MMWA claim can be based. The Court agrees.

8 As an initial matter, while the Plaintiff's MMWA claim
9 constitutes a separate federal cause of action for breach of an
10 implied warranty, courts must look to the relevant state law to
11 determine the meaning and creation of any implied warranty. See
12 15 U.S.C. § 2301(7) ("The term 'implied warranty' means an
13 implied warranty arising under State law ... in connection with
14 the sale by a supplier of a consumer product.") Significantly,
15 it has been uniformly held that Magnuson-Moss does nothing to
16 alter or modify state law requirements. See *Gill v. Blue Bird*
17 *Body Co.*, 147 Fed. Appx. 807, 810 (11th Cir. 2005); see also
18 *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 291 (4th Cir. 1989) ;
19 *Walsh v. Ford Motor Co.*, 257 U.S. App. D.C. 85, 807 F.2d 1000,
20 1011 (D.C. Cir. 1986) ("Under the terms of Magnuson-Moss, state
21 law governs the existence and basic meaning of implied
22 warranties."); *Kanter v. Warner-Lambert Co.*, 99 Cal. App. 4th
23 780, 798 (Cal. Ct. App. 2002) ("State law applies in breach of
24 warranty actions as to both implied and written warranty claims
25 under Magnuson-Moss, except as expressly stated by that act.")
26 Accordingly, absent a viable claim arising under California law,
27 this cause of action must be summarily adjudicated in favor of
28 Fleetwood.

1 Plaintiff maintains that his MMWA claim should proceed based
2 on implied warranty rights arising under both the Song-Beverly
3 Act and the California Uniform Commercial Code ("UCC Claim").
4 See Cal. U. Comm. Code § 2314. As explained above, the Court
5 finds that Plaintiff cannot proceed on a claim under the Song-
6 Beverly Act. Accordingly, his MMWA claim based solely on his
7 underlying Song-Beverly Act fails. The question remains,
8 however, whether the implied warranties existing under the
9 Commercial Code can provide the basis for Plaintiff's MMWA claim.

10 In resolving this question, the Court must first examine the
11 relationship between the Song-Beverly Act and the Commercial Code
12 to determine the extent to which, if any, the Song-Beverly Act
13 has a preclusive effect on the earlier enacted Commercial Code.
14 Pursuant to California Civil Code section 1790.3, the Song-
15 Beverly Act does not affect rights and obligations under the
16 Commercial Code, except that where provisions conflict, the Song-
17 Beverly Act prevails over the Commercial Code. The question thus
18 becomes whether there is a conflict between the Song-Beverly Act
19 and the Commercial Code.

20 As discussed in detail above, the Song-Beverly Act implied
21 warranties apply only to vehicles sold in California. Cal. Civ.
22 Code § 1792 ("every sale of consumer goods that are sold at
23 retail *in this state* shall be accompanied by the manufacturer's
24 and the retail seller's implied warranty that the goods are
25 merchantable") (emphasis added). Conversely, the Commercial Code
26 contains no such limitation.

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1 It is a generally accepted rule of statutory construction
2 that a general statute must give way
3 to a more specific statute addressing the same subject. *De Anza*
4 *Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz*
5 *Mobile Estates*, 94 Cal. App. 4th 890, 912 (Cal. Ct. App. 2001)
6 (citing *Schmidt v. Superior Ct.*, 48 Cal. 3d 370, 383 (1989)
7 (under traditional principles of statutory interpretation, later
8 enacted and more specific provisions prevail over more general
9 provisions.)

10 Here, the Commercial Code must bow to the later enacted
11 Song-Beverly Act that limits implied warranties to those vehicles
12 sold in California. Because Plaintiff did not purchase the
13 Bounder in California, his MMWA cause of action based on
14 Fleetwood's alleged violation of the Commercial Code fails.
15 Accordingly, Fleetwood's Summary Adjudication Motion as to
16 Plaintiff's fourth cause of action is granted.

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18 **4. Unfair Business Practices Act**

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20 Plaintiff concedes that Fleetwood is entitled to Summary
21 Adjudication on Plaintiff's eleventh cause of action.
22 Accordingly, summary adjudication as to Plaintiff's eleventh
23 cause of action is proper and hereby granted.

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CONCLUSION

The Court grants Summary Adjudication in favor of Fleetwood on Plaintiff's first and second causes of action based on the Song-Beverly Act; Plaintiff's fourth cause of action based on the MMWA; and Plaintiff's eleventh cause of action based on California's Unfair Business Practices Act. However, the Court denies Fleetwood's Motion for Summary Adjudication on Plaintiff's third cause of action for breach of express warranties under the MMWA.

IT IS SO ORDERED.

DATED: July 25, 2006

A handwritten signature in blue ink, appearing to read "Morrison C. England, Jr.", is written over a horizontal line.

MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE